United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

77-7067

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NOVELTY TEXTILE MILLS INC.,

Plaintiff-Appellant,

—v.—

JOAN FABRICS CORPORATION,

Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NOVELTY TEXTILE MILLS INC.,

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Docket No.

77-7067

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT
NOVELTY TEXTILE MILLS INC.

The liberties taken by JOAN in treating the facts of this case and its tortured application of the law bespeak a Reply.

POINT ONE

MISAPPLICATION OF ORDINARY OBSERVER TEST IS MISTAKE OF LAW

JOAN would have this Court believe that the misapplication of the law of copyright infringement by the District Court was nothing more than semantics, the exalting of form over substance.

To the contrary, Judge Werker's fundamental error was in creating a test more stringent than heretofore established by the courts, a test which could be met only if the accused fabric design were identical to the original copyrighted design. The District Court found that the differences between the JOAN fabric design and the NOVELTY fabric design "would be apparent to a furniture manufacturer, or for that matter to a consumer seriously contemplating purchase of a couch covered with one or another of the fabrics" (A-222) and the "differences --- far exceed the similarities" (A-220). These conclusions announced by the District Court are substantive departures from the "ordinary observer" test established by this Court and discussed in NOVELTY's main Brief, pp. 10-20. Even if an observer would find the differences to be apparent and could count the number of differences in excess of the number of similarities, copyright infringement would still be present if the ordinary

observer would be disposed to overlook the disparities[1] or the average lay observer would recognize that the copyrighted work had been appropriated.[2] In fact, this Court made such a finding in Concord Fabrics, Inc. v. Marcus Brothers Textile Corp., 409 F.2d 1315 (2d Cir. 1969) when it compared the two fabrics which are reproduced in full scale color photographs in NOVELTY's main Brief.

NOVELTY does not complain that the District Court failed to use "magic" words. It is the conceptual, logical analysis of copyright infringement established in this Circuit that the District Court failed to understand and apply.

The District Judge gave the fabrics his "courtroom scrutiny"[3] and listed similarities of color and diamond dimension and five differences. These similarities and differences are certainly "apparent"

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1. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960)

2. Ideal Toy Corporation v. Fab-Lu Ltd., 360 F.2d 1021 (2d Cir. 1966)

3. Soptra Fabrics Corp. v. Stafford Knitting Mills,Inc., 490 F.2d 1092 (2d Cir. 1974)

to all who care to closely examine the fabrics. Consideration of the testimony at the evidentiary hearing is unnecessary. But that is not the test. Both fabrics will be put to "use"[4] as upholstery fabrics. How would the "average lay observer",[5] the consumer, react when seeing two different sofas in two different furniture stores, one upholstered in NOVELTY's fabric and the other in JOAN's? Would not the consumer say: "That sofa is upholstered in a fabric of the same design as the sofa I saw earlier." Soptra v. Stafford, supra. cited with approval by JOAN, Brief p. 12. The consumer would, if given the opportunity to make a close side-by-side comparison, find "apparent" differences but the test of copyright infringement would already have been met. Note that under the Soptra test, the ordinary observer is the consumer, not the manufacturer (dress or furniture) who is the direct customer of the fabric manufacturer and is daily in the market of buying fabrics.

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4. Soptra v. Stafford, supra, Footnote 3.

5. Ideal Toy v. Fab-Lu, supra, Footnote 2.

NOVELTY has not argued that JOAN's "expression" should not be compared to NOVELTY's "expression". In fact, it is the "expression" that is protected by copyright, not the idea,and NOVELTY lays no claim to the idea of a bias plaid in a knitted upholstery fabric. However, Judge Werker's Memorandum Decision (A-217) is devoid of any finding on "expression". The Judge detailed some similarities and some differences but never reached the threshold question as to whether NOVELTY's "expression" had been copied by JOAN's.

In special factual circumstances, courts have limited the scope of a copyright. The best example was cited in JOAN's brief. In Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64 (2d Cir. 1974), this Court found no infringement of a copyright on a gold turtle pin where each pin "conforms generally to the shape of a turtle as that reptile appears in nature." 509 F.2d at 65. No such similar circumstance here applies.

POINT TWO

SECOND CIRCUIT DOES NOT REQUIRE PROOF OF IRREPARABLE INJURY FOR PRELIMINARY INJUNCTION IN CASE OF COPYRIGHT INFRINGEMENT

JOAN categorically states that it is "well settled and beyond dispute" (JOAN Brief p. 6) that the general standards for preliminary injunction apply to copyright cases in this Circuit. For this proposition JOAN cites three Second Circuit cases, none of which had any involvement with copyright.

While this Point has been fully briefed in NOVELTY's main Brief, pp. 30-37, JOAN would have this Court affirm on the basis that irreparable injury has not been proven and that the status quo of continued infringement should be preserved.

Even if Triebwasser[6] applies to Copyright Cases (a proposition not acknowledged to be the law

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6. Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976)

of this Circuit[7]), only "possible"irreparable injury need be shown and under Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955), the showing need not be "detailed".

What then is required for a non-detailed showing of possible irreparable injury?

Judge Werker found that NOVELTY's sales of its copyrighted fabric "declined precipitously following Joan's introduction of its new lines." (A-218). Even if the lost sales of $11,000 per week could not all be attributed to JOAN, this is unquestionably a non-detailed demonstration of possible irreparable injury. The copyright law provides for an award in cases of infringement of the copyright proprietor's damages and the infringer's profits. 17 U.S.C. 101(b). JOAN's records relate only to the infringer's profits. The

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7. The granting of a preliminary injunction in a case of copyright infringement once the existence of the copyright and its infringement have been established and without proof of irreparable harm has been approved by this Court time and time again. The law can be traced back to 1922 and beyond. American Code Co. v. Bensinger, 282 F.829 (2d Cir. 1922). NOVELTY's main Brief p.32 lists cases that have followed American Code through the latest reported case in 1972. JOAN has failed to cite a single case criticizing the doctrine.

difficulty in proving actual damages, that lost sales are a direct result of the infringement and that the copyright proprietor would have made the sales were it not for the infringement mandate at most a minimal showing for preliminary injunction in cases of copyright infringement where the copyright proprietor demonstrates a likelihood of success on the merits.

JOAN justifies the continued presence of its plagiarized designs on the competitive presence in the marketplace of other Argyle plaids, on its ability to pay money damages, on the fact that NOVELTY has other lines on which it can survive as a viable company and on the alleged longer life of plaid upholstery fabrics.

JOAN, to the contrary, well knows that the availability of its cheaper goods (A-168, 169) in cheaper furniture lines will destroy these designs for the more exclusive furniture lines which use NOVELTY's more expensive fabrics (A-97) and a permanent injunction will come too late for the designs in issue.

The copyright law has a special section authorizing a preliminary injunction upon complaint filed by an aggrieved party. 17 U.S.C. 112. Congress mandated special preliminary treatment for copyrights in addition to permanent injunctions authorized under 17 U.S.C. 101(a).

POINT THREE

FACTUAL LIBERTIES TAKEN BY JOAN

In its main Brief, NOVELTY set forth on pages 3 through 6 the findings of the District Court which were not disputed for the purposes of Appeal. From this, JOAN has expanded admitted or proven facts to a point beyond inaccuracy.

NOVELTY has not admitted that the bias plaid theme of JOAN differs from that of NOVELTY. On the contrary it is the theme and expression which JOAN has plagiarized. NOVELTY admits nothing more than that the fabrics are not identical and that the differences as listed by Judge Werker (A-220) would be apparent to anyone making a close examination of the fabrics.

JOAN states, as a matter of fact, that furniture manufacturers continue to buy fabrics containing the respective versions of the design from

both parties but omits that the testimony established that furniture manufacturers discontinued purchasing the color Cane [75% of NOVELTY's sales in Style 253 (A-219)] after it commenced purchasing a similar color combination from JOAN (A-92; A-170).

JOAN lists on pp. 9-10 of its Brief a number of facts and ascribes admission or absence of dispute by NOVELTY. NOVELTY vigorously protests:

1. The gravamen of NOVELTY's complaint is that JOAN copied NOVELTY's expression. NOVELTY admits only that specific differences can be found upon close examination and would be "apparent" to a manufacturer or consumer making a side-by-side comparison.

2. That all Argyle plaids do not infringe NOVELTY's copyright was not an admission by NOVELTY's president that its "copyright is quite limited." On the contrary, NOVELTY's president has no doubt that its copyright covers JOAN's designs.

3. The acknowledged myriad of Argyle plaids and the limitless capabilities of Cidega machines (A-112,113) belies JOAN's statement that "there are only a limited number of changes possible" in designing Argyle plaids.

4. NOVELTY has consistently maintained that its design features in Style 253 are unique as are the selections of features from the knitting capabilities of a Cidega machine to create the total design. The acknowledgment that a single selected feature of the design is not, in and of itself, unique (A-132), is not an acknowledgment that the totality of selected features and the combination of such features is not unique.

5. The District Court made no finding as to whether the respective customers of NOVELTY and JOAN recognize the designs to be different. JOAN's President, Anson, admitted that his testimony was hearsay (A-167) and JOAN's employee, Gangi, could not identify one customer who recognized that the expressions were different (A-208 thru 210).

6. The Court below did not make a finding as to whether JOAN's designer had a sample of NOVELTY's fabric before him while producing the JOAN designs and any such conclusion is not only disputed by NOVELTY but is strongly doubted in view of the "coincidence" between the physical features which contribute to the NOVELTY expression and the physical

features incorporated in the JOAN fabric. Furthermore, if it is true that JOAN personnel were instructed to avoid infringement, Gangi must perforce have had NOVELTY's fabric available for comparative purposes.

7. The policies of JOAN and the instructions given to the individuals charged with copying NOVELTY's design without infringing its copyright were not admitted by NOVELTY but have no bearing on whether infringement has occurred.

CONCLUSIONS

The Briefs establish that the District Judge erroneously applied the law to the facts not in dispute. As the evidentiary hearing added nothing to these facts, this Court, following its own precedents, should determine that JOAN has infringed NOVELTY's copyright

and that NOVELTY is likely to succeed on the merits.

It is requested that the District Court be reversed and the case remanded with instructions to issue a preliminary injunction against JOAN's fabrics denominated as CK-0028, CK-0035, CK-0042, Fleetwood and Electra, in all color-ways.

Respectfully submitted,

BLUM, MOSCOVITZ, FRIEDMAN & KAPLAN
Attorneys for Plaintiff-Appellant

James K. Silberman
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

VINCENT PANZA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2002 ELLIS AVE BRONX, N.Y.

That on the 25th day of MARCH, 1977, deponent personally served the within REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant-Appellee
425 Park Avenue
New York, N.Y.

Vincent Panza

Sworn to before me this

25th day of MARCH, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

Counsel Press, 55 West 42nd Street, PE 6-8460